EON Bank Bhd v BH Steel Sdn Bhd & Anor

HIGH COURT (MELAKA) — ORIGINATING SUMMONS NO 24–205 OF 2003
LOW HOP BING J
14 OCTOBER 2004

Land Law — Sale of land — Public auction — Registrar allowed late bidder to put in bid — Whether should be allowed

Civil Procedure — Appeal — Right to appeal — Appeal against decision of registrar involving public auction — Whether should be allowed

This was an appeal by the appellant-intervener ('the intervener') against the decision of the registrar ('the registrar') who had allowed one Khoo Guan Swee ('Khoo') to offer a bid at 9.40am ie after 9.15am in a public auction for a piece of land on 17 May 2004 for a declaration that the intervener was the sole successful bidder at the reserve price of RM435,000. The intervener was the successful bidder but at the purchase consideration of RM521,000. The issues before this court were: (i) whether on the aforesaid facts the registrar's extension of time is appeallable; and (ii) whether the registrar who conducted the auction has the discretion to grant an extension of time to allow late registration of bidders after the bailiff had closed the registration at 9.15am.

Held, dismissing the appeal:

(1) The test for a party's right to appeal in a civil or a criminal proceeding has to be determined by the element of finality in disposing of the party's rights and not merely a purely procedural ruling (see para 19).

(2) Mere registration of the intervener as a bidder in a public auction is merely the first step in the entire proceedings for the conduct of the auction. The proclamation of sale serves as an advertisement and a notification to the public at large of the place, date and time of the auction. It is in effect an invitation to treat, as opposed to an offer to the public (see para 20).

(3) The registration as a bidder only gives him the right to offer his bid at the auction. His subsequent bidding constitutes a mere offer to purchase. Condition 5 of the proclamation of sale stated that the registrar has the power to reject any bid in that the bid of the intervener is still subject to the conditions contained in the proclamation of sale. That being the case, during the period between the time of registration of the intervener as a bidder and the acceptance of the intervener's bid, the intervener's right remains a contingent and not a vested right (see para 23). No contractual rights and obligations have been created at that stage (see para 24).

(4) The extension of time granted by the registrar in order to allow Khoo to offer his bid in the public auction was a purely procedural ruling and does not finally dispose of the rights of the intervener as a bidder, in which case it does not come within the scope, ambit and purview of 'judgment, order or decision' under O 56 r 1(1) read with s 3 of the Courts of Judicature Act 1964 (see para 25).

(5) The registrar's order granted pursuant to the summons for direction has made it abundantly clear and unambiguous that while the time for the auction has been fixed at 9.15am, the registrar may, in his subjective view, ie as he thinks fit, hold the auction at any other time on the auction date. The registrar therefore has and may exercise his discretion so as to extend the auction time from 9.15am onwards so long as the auction is conducted on the auction date itself ie 17 May 2004. This is fortified by s 259(1) and, (2)(a) and (b) of the National Land Code (see para 29).

[**Bahasa Malaysia summary**

Ini adalah rayuan oleh perayu-pencelah ('pencelah') terhadap keputusan pendaftar ('pendaftar tersebut') yang telah membenarkan Khoo Guan Swee ('Khoo') membuat tawaran lelongan pada pukul 9.40pg iaitu selepas 9.15pg dalam satu lelongan awam untuk sekeping tanah pada 17 Mei 2004 untuk satu deklarasi bahawa pencelah adalah satu-satunya penawar yang berjaya pada harga rizab RM435,000. Pencelah adalah penawar berjaya itu tetapi pembelian yang dipertimbangkan berjumlah RM521,000. Persoalan di hadapan mahkamah adalah: (i) sama ada berdasarkan fakta-fakta lanjutan masa pendaftar boleh dirayu; dan (ii) sama ada pendaftar yang mengendalikan lelongan mempunyai budi bicara untuk memberikan lanjutan masa bagi membenarkan pendaftaran lewat penawar-penawar selepas bailiff menutup pendaftaran pada pukul 9.15pg.

Diputuskan, menolak rayuan tersebut:

(1) Ujian untuk hak merayu suatu pihak dalam prosiding sivil atau jenayah perlu ditentukan oleh elemen kemuktamadan dalam pemberian hak pihak tersebut dan bukan hanya semata-mata satu arahan prosedural (lihat perenggan 19).

(2) Pendaftaran semata-mata oleh pencelah sebagai penawar dalam lelongan awam hanyalah langkah pertama dalam keseluruhan prosiding bagi pelaksanaan lelongan. Pengisytiharan jualan dianggap sebagai satu iklan dan pemakluman kepada orang awam tentang tempat, tarikh dan masa lelongan tersebut. Ia pada hakikatnya adalah satu *'invitation to treat'*, dan bukan satu tawaran kepada orang awam (lihat perenggan 20).

(3) Pendaftaran sebagai seorang penawar hanya memberikan beliau hak untuk membuat tawaran beliau dalam lelongan tersebut. Tawaran beliau

yang berikutnya hanya membentuk tawaran untuk jualan sahaja. Syarat 5 pengisytiharan jualan menyatakan bahawa pendaftar mempunyai kuasa untuk menolak apa-apa tawaran yang mana tawaran pencelah masih tertakluk kepada syarat yang terkandung dalam pengisytiharan jualan. Dalam kes sedemikian, semasa tempoh antara masa pendaftaran pencelah sebagai penawar dan penerimaan tawaran pencelah, hak pencelah masih hak yang kontinjen dan bukan yang diberikan (lihat perenggan 23). Tiada hak dan obligasi kontraktual terbentuk pada peringkat itu (lihat perenggan 24).

(4) Lanjutan masa yang diberikan oleh pendaftar dalam perintah yang membenarkan Khoo membuat tawaran dalam lelongan awam tersebut hanya satu arahan prosedural semata-mata dan tidak melupuskan keseluruhan hak pencelah sebagai penawar dan perintah ini tidak jatuh di bawah '*judgment, order or decision*' di bawah A 56 k 1(1) dibaca bersama s 3 Akta Mahkamah Kehakiman 1964 (lihat perenggan 25).

(5) Perintah pendaftar yang diberikan menurut saman arahan dengan nyata dan tidak taksa menyatakan walaupun masa lelongan tersebut telah ditetapkan pada pukul 9.15pg, pendaftar boleh, pada pendapat subjektif beliau, iaitu, yang difikirkan sesuai, mengadakan lelongan tersebut masa lain pada tarikh lelongan tersebut. Pendaftar oleh demikian mempunyai dan boleh menggunakan budi bicara beliau untuk melanjutkan masa selepas 9.15pg asalkan lelongan tersebut diadakan pada tarikh lelongan tersebut iaitu 17 Mei 2004. Ini diperuntukkan dalam s 259(1) dan (2)(a) dan (b) Kanun Tanah Negara (lihat perenggan 29).]

Notes

For appeals, see 1 *Halsbury's Laws of Malaysia* para [10.11-001].

For cases on public auction, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3695–3697.

For cases on right to appeal, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1177–1185.

Cases referred to

Eckhardt Marine Gmbh v Sheriff, High Court Of Malaya, Seremban & Ors [2001] 4 MLJ 49 (refd)

Majumder v Attorney-General of Sarawak [1967] 1 MLJ 101 (refd)

Maleb bin Su v Public Prosecutor [1984] 1 MLJ 311 (refd)

Public Prosecutor v Hoo Chang Chwen [1962] MLJ 284 (refd)

Public Prosecutor v RK Menon & Anor [1978] 2 MLJ 152 (refd)

Syarikat Tingan Lumber Sdn Bhd v TakangTimberSdnBhd [2003] 2 MLJ 495 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 3
Criminal Procedure Code s 307(i)
National Land Code ss 258(2), 259(2)
Rules of the High Court 1980 O 3 r2(3), O 56 r1(1)

Wong Fook Meng (Chee Siah Le Kee & Partners) for the plaintiff.
Shaari Nor (Shaari Nor & Co) for the intervener.

Low Hop Bing J:

I APPEAL

[1] This is an appeal in encl (25) lodged by the appellant-intervener ('the intervener') against the decision of the learned registrar ('the registrar') who had allowed one Khoo Guan Swee ('Khoo') to offer a bid at 9.40am ie after 9.15am in a public auction on 17 May 2004.

[2] The intervener in seeking to set aside the said decision is also praying for a declaration that the intervener is the sole successful bidder at the reserve price of RM435,000.

II FACTUAL BACKGROUND

[3] Pursuant to an order for sale, a piece of land held under PT No 1666 HS(D) 33856 ('the land') in the mukim of Krubong, Melaka was to be sold on 17 May 2004.

[4] Upon hearing a summons for directions, the registrar has on 25 March 2004 made an order ('the registrar's order') wherein para 1 reads:

> (1) Jualan hendaklah dijalankan pada 17 Mei 2004 pada pukul 9.15pg atau pada waktu lain yang Penolong Kanan Pendaftar fikirkan sesuai pada tarikh lelong di bilik lelongan, Mahkamah Tinggi
>
> [My translation:
>
> The sale shall be held on 17 May 2004 at 9.15am *or at such other time which the Senior Assistant Registrar thinks fit on the auction date* in the auction room of the High Court.] (Emphasis added).

[5] The registrar's order has also been specifically stated in the introductory paragraph of the proclamation of sale which also contains the conditions of sale. Condition 5 provides as follows:

> Tertakluk kepada harga rizab, penawar yang tertinggi, jika dibenarkan oleh Timbalan Pendaftar, Mahkamah Tinggi, Melaka akan menjadi pembeli dan Timbalan Pendaftar mempunyai kuasa untuk menolak sebarang tawaran. Jika ada apa-apa pertikaian yang timbul mengenai penawar yang tertinggi sekali, maka ianya itu akan mengikut

budi bicara Timbalan Pendaftar untuk menjual dan melelong semula atau Timbalan Pendaftar akan memutuskan pertikaian tersebut. Setiap keputusan Timbalan Pendaftar adalah muktamad.

[My translation:

Subject to the reserve price, the highest bidder, if allowed by the Deputy Registrar, High Court Melaka shall become the purchaser and the Deputy Registrar has the power to reject any bid. If there is any dispute which arises in connection with the highest bidder, then the Deputy Registrar may in his discretion order a resale and re-auction or resolve the dispute. Every decision of the Deputy Registrar shall be final.]

[6] One Chua Chin Yap, the managing director of the intervener, was in the auction room of this court at 8.40am on that day to offer his bid for the land. He filled in the prescribed form and surrendered it together with his identity card and a bank draft for RM43,500 as deposit to the court bailiff before 9.15am, all of which were received by the bailiff.

[7] At 9.40am, the registrar went to the auction room to conduct the auction. He was assisted by the bailiff and a licensed auctioneer. In the auction room, Khoo met the registrar to whom he made an oral application for leave to be registered as a bidder in order to offer his bid after 9.15am on the grounds that:

(1) He had arrived at the auction room at 9.25am ie 10 minutes after the bailiff had closed the registration for bidding;

(2) He had with him a bank draft for RM49,000, being slightly more than 10% of the reserve price;

(3) The 10 minutes delay was caused by his being unfamiliar with the auction room of the court as this was his first visit to the court; and

(4) He was keen to bid for the land which is adjoining his land.

[8] The intervener vehemently objected to the said oral application for late registration, but the objection was overruled by the registrar, in the exercise of his discretion to extend the time for registration.

[9] The auction then proceeded with the offer of bids from the two aforesaid bidders, which concluded with the intervener as the successful bidder at the purchase consideration of RM521,000.

III ISSUES FOR DETERMINATION

[10] There are two issues for determination viz:

(1) Whether on the aforesaid facts the registrar's extension of time is appealable? and

(2) Whether the registrar who conducted the auction has the discretion to grant an extension of time to allow late registration of bidders after the bailiff has closed the registration at 9.15am?

IV INTERVENER'S RIGHT OF APPEAL

[11] For the plaintiff, learned counsel Mr Wong Fook Meng submitted that the intervener had no right to appeal against the extension of time as it was a procedural ruling made in a public auction, which he said was not a 'judgment, order or decision' within O 56 r 1(1) of the Rules of the High Court 1980 ('O 56 r1(1)'); and s 3 of the Courts of Judicature Act 1964 ('s 3'). He relied on *Syarikat Tingan Lumber Sdn Bhd v TakangTimberSdnBhd* [2003] 2 MLJ 495 CA; and *Maleb bin Su v Public Prosecutor* [1984] 1 MLJ 311.

[12] In this respect, the response of En Shaari Nor, the intervener's learned counsel, is that the extension of time is a judgment, order or decision, as opposed to a procedural ruling because the intervener's rights as a bidder are affected.

[13] In my judgment, the procedural law regulating appeals from the registrar to a judge in chambers is to be found in O 56 r1(1) which merits reproduction as follows:

(1) An appeal shall lie to a Judge in chambers from any *judgment, order or decision* of the Registrar. (Emphasis added)

[14] The Rules of the High Court 1980 does not provide for the definition of the words 'judgment, order or decision'.

[15] However s 3 defines the word 'decision' as meaning judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

[16] In *Syarikat Tingan Lumber Sdn Bhd,* supra*,* a judgment delivered by PS Gill JCA (now FCJ) held that the ruling of a registrar on an issue in regard to the admissibility of certain documents in the course of a hearing, for assessment of damages, was a ruling on an issue other than the ultimate question, and thus, excluded by the exclusion clause in the definition of 'decision' in s 3 (see p 502 D–E).

[17] In respect of criminal proceedings, s 307(i) of the Criminal Procedure Code, where relevant, provides that any person who is dissatisfied with 'any judgment, sentence or order' pronounced by any magistrate's court in any criminal cause or matter to which he is a party may prefer an appeal to the High Court against any such 'judgment, sentence or order'.

[18] Section 307(i) was judicially considered by Hashim Yeop A Sani FJ (later CJ(M)), sitting as an appellate High Court judge in *Maleb bin Su*, supra, in which the learned judge held, inter alia, that the dismissal by a magistrate

of an application to disqualify himself from proceeding with the case did not finally dispose of the rights of the accused person and the order was not a proper order for appeal under s 307(i). His Lordship added that the order must be a final order in the sense that it is final in effect as in the case of a judgment or a sentence, and that the test for determining the finality of an order is to see whether the judgment or order finally disposes of the rights of the parties, as opposed to a purely procedural ruling. The learned judge gave two instances viz :

(1) In *Public Prosecutor v Hoo Chang Chwen* [1962] MLJ 284 where Rose CJ of Singapore dealt with an appeal on the admissibility of certain documents and held that the ruling of the magistrate was a procedural ruling and therefore not an appealable order; and

(2) In *Public Prosecutor v RK Menon & Anor* [1978] 2 MLJ 152 where Ajaib J (later SCJ) took the view that a ruling on non-compliance with s 129(i)(b) of the Criminal Procedure Code was a procedural and non-appealable ruling.

[19] It is to be observed that the test for a party's right to appeal, be it in a civil or a criminal proceeding is the same ie it is to be determined by the element of finality in disposing of the party's rights and not merely a purely procedural ruling.

[20] Applying the principles enunciated above to the facts of this case, I am of the view that the mere registration of the intervener as a bidder in a public auction is merely the first step in the entire proceedings for the conduct of the auction. The proclamation of sale serves as an advertisement and a notification to the public at large of the place, date and time of the auction. It is trite law that it is an invitation to treat, as opposed to an offer to the public.

[21] In *Majumder v Attorney-General of Sarawak* [1967] 1 MLJ 101 FC, the Federal Court through the judgment of Harley Ag CJ (Borneo) at p 104 approved the decision of the learned trial judge to the effect that the advertisement was in fact merely 'an invitation to treat' which could not be incorporated into the contract.

[22] A similar conclusion was arrived at by the Court of Appeal in *Eckhardt Marine Gmbh v Sheriff, High Court Of Malaya, Seremban & Ors* [2001] 4 MLJ 49.

[23] The registration as a bidder can only give him the right to offer his bid at the auction. His subsequent bidding constitutes a mere offer to purchase. Condition 5 of the proclamation of sale has made it abundantly clear that the registrar has the power to reject any bid. In other words, the bid of the intervener is still subject to the conditions contained in the proclamation of sale. That being the case, during the period between the time of registration of the intervener as a bidder and the acceptance of the intervener's bid, the intervener's right remains a contingent and not a vested right.

[24] Hence, the intervener's bid merely constituted an offer to purchase at the auction and unless the offer was accepted by the registrar pursuant to condition 5, no legally binding contract has yet been brought into existence. No contractual rights and obligations have been created at that stage.

[25] In the circumstances, I hold that the extension of time granted by the registrar in order to allow Khoo to offer his bid in the public auction was a purely procedural ruling and does not finally dispose of the rights of the intervener as a bidder, in which case it does not come within the scope, ambit and purview of 'judgment, order or decision' under O 56 r1(1) read with s 3.

[26] However, I am prepared to assume that I have erred in my finding above and hence to proceed with the consideration and determination of the second issue as stated above on its merits.

V EXERCISE OF DISCRETION

[27] Learned counsel for the intervener submitted that the registrar had no discretion, as the proclamation of sale distributed to members of the public did set out the conditions of sale which must be complied with, under s258(2) of the National Land Code 1965 and O 3 r2(3) of the Rules of the High Court 1980, as a result of which he contended that after 9.15am on 17May 2004, there was no discretion to extend the time. He added that the extension was a wrong exercise of discretion, on the basis of misdirection of law in relation to s 258(2) and s 259(2), in that s 258(2)(a) refers to the registrar's power to give directions pertaining to the conditions of sale before the auction, while s 259(2) provides for the procedure at the auction.

[28] The plaintiffs learned counsel relied on, *inter alia*, s 259(1) & (2)(a) and (b) of the National Land Code 1965, and the registrar's order dated 25 March 2004 to support his contention that the registrar has the discretion to extend the time.

[29] Having carefully considered the facts and circumstances together with the above submissions, I am of the view that the registrar's order granted pursuant to the summons for direction has made it abundantly clear and unambiguous that while the time for the auction has been fixed at 9.15am, the registrar may, in his subjective view, ie as he thinks fit, hold the auction at any other time on the auction date. The registrar therefore has and may exercise his discretion so as to extend the auction time from 9.15am onwards so long as the auction is conducted on the auction date itself ie 17 May 2004.

[30] Further s 259(1) and (2)(a) and (b) of the National Land Code 1965 read as follows:

259Procedure at sale.

(1) Every sale pursuant to an order under section 256 shall take place under the direction of an officer of the Court, but this sub-section shall not prevent the Court from taking the assistance thereat of any licensed auctioneer.

A (2) The officer under whose direction the sale takes place shall:

(a) receive the bids (including any bid by or on behalf of the chargee);

(b) settle summarily any question arising in the course of the proceedings;

(c) …;

(d) ….

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[31] In my view, s 259(1) provides for the auction to take place under the direction of the officer of the court. In this respect, the officer is the registrar. Section 259(2)(a) and (b) make it incumbent upon the registrar by way of a duty to receive the bids and settle summarily any question arising in the course C of the proceedings. These provisions are sufficiently wide to encompass the extension of time granted by the registrar for the purposes of the registration of a bidder such Khoo as that was one of the questions that has arisen in the course of the proceedings relating to the auction.

[32] In the circumstances, I am of the view that the registrar has not only D exercised his discretion properly and reasonably pursuant to his own order granted on a summons for direction, but has also discharged his duties particularly under s 259(2)(a) and (b). I therefore affirm his decision and hold that this appeal by the intervener is without merits and is hereby dismissed with costs.

E *Appeal dismissed.*

Reported by AG Kalidas

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